No. 870

IN THE

# UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT.

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## PETITION FOR REHEARING.

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PATRICK CLARK, BENJAMIN C. KINGSBURY, JAMES P. HARVEY and A. G. KERNS, Administrator of the Estate of JAMES CLARK, Deceased,
*Appellants,*

*vs.*

THE BUFFALO HUMP MINING COMPANY (a Corporation), and THE EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY (a Corporation),
*Appellees.*

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Upon Appeal from the United States Circuit Court for the District of Idaho, Northern Division.

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MAY 16 1903

W. T. STOLL,
M. J. GORDON,
Solicitors for Complainants.

PRESS OF
SHAW & BORDEN CO.,
SPOKANE, WASH.

IN THE

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## FOR THE NINTH CIRCUIT.

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| PATRICK CLARK, BENJAMIN C. KINGSBURY, JAMES P. HARVEY, and A. G. KERNS, Administrator of the Estate of JAMES CLARK, Deceased, *Appellants*,<br>vs.<br>THE BUFFALO HUMP MINING COMPANY (a Corporation), and THE EMPIRE STATE-IDAHO MINING & DEVELOPING COMPANY (a Corporation), *Appellees*. | **No. 870.**<br>**PETITION FOR REHEARING.** |

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The appellants respectfully petition the Court for a rehearing in this case upon the ground that the Court erred in its conclusions: first, on the facts; and second, on the law applicable to the facts.

*Points and Argument.*

Of course, we concede the time-honored maxim, "He who comes into Equity must come with clean hands," but we do not think that doctrine applicable to the facts in this case. In the opinion, it is said: "To that information (stating it), the "complainants were not entitled * * * * The withhold- "ing from the complainants by Culbertson of such information

"constitutes a part of the grievances of which complainants "complain, to what extent it is not important to inquire." With all deference and respect to the Court, we earnestly insist that the record will be searched in vain for anything to justify the conclusion that, "The withholding from complainants by "Culbertson of such (or any) information constitutes part "of the grievances of which complainants complain," etc. We *do not* claim that Culbertson *violated any agreement with us,* nor do we base our cause of action upon anything *arising out of any agreement with him, or the violation of any agreement.* It is true, paragraph six of the bill sets up an agreement with Culbertson and the evidence tends to prove that agreement, but it is not charged or proved that he ever violated that agreement.

The cause of action is:

First—That the Buffalo Hump Co. prospected *our ground without our consent,* and discovered valuable ore bodies within it *without our knowledge,* and purchased the claims without disclosing to us *the knowledge so obtained.*

Second—That Culbertson, *our tenant in common,* while Assistant General Manager of the Buffalo Hump Co., and Sweeny, its General Manager, *made false representations to us concerning our property.* We do not allege, nor attempt to prove, that Culbertson ever *suppressed from us the condition of the east end of the Poorman mine, or the condition of any ore discoveries therein,* nor do we contend that *there were any ore discoveries at any time in the east end of the Poorman mine* which, if communicated to us, would have justified the conclusion that the "Ella" had any greater value than we re-

ceived. The fact is, if Culbertson had given us *all the information concerning the condition of the defendant's property,* we would have sold the "Ella" for the same price that defendants paid, while had Culbertson and Sweeny given us the information concerning the condition of *our own property, the thing which we charge as fraud,* we would not have sold it for $100,-000.00. Therefore, the agreement with Culbertson had no relation to, nor bearing upon, the fraud charged in the bill. All reference to the agreement with Culbertson can be eliminated from the bill without destroying its sufficiency. It was bound, however, to come out in evidence, and we felt that the *fair way to deal with a Court of Equity was to set it up in the bill*

It does not appear that the information sought, and which Culbertson agreed to give, was ever intended to be used to the *detriment or prejudice of his employer,* or for any *unlawful purpose,* or that the nature of it was such as to operate to the *disadvantage of his employer,* or to any *unlawful* advantage to ourselves And here, we say, is the true distinction in this case, and where the Court erred in concluding this agreement to be unlawful in Equity. Apart from this, the sworn answer of defendants (See latter end of paragraph V., p. 34. Trans.) sets up the following:

"but allege that the said *combination shaft,* and all *work-*
"*ings* (*of said Tiger & Poorman mines*), *excavations, tun-*
"*nels, drifts* or *means of approach in and through any part*
"*thereof,* were at all times open, accessible, and subject to the
"inspection of the *complainants,* or any of them."

And both Sweeny and Culbertson positively testify and assert that they would have shown us their underground workings at any time. What, then, is there unlawful or fraudulent in the agreement *so far as it affects the defendants in this case?* The information which Culbertson agreed to give us, and which the Court says we were not entitled to, and for the making of a contract concerning which the Court has said it would shut the door of Equity against us, Mr. Culbertson's *employer has said he had a right to give to us, and that he would himself have given to us freely and voluntarily.*

But, if it be true that the agreement between Clark and Culbertson was immoral or illegal, the most that would follow is that *neither party could take any benefit from it.* The Court would not enforce it in the interest of either party, nor would the Court, *for the mere making of such an agreement, turn either party out of Court and deny him Equity upon the case which remains after that agreement is disposed of.* Such is the plain holding of McBlair v. Gibbes, 17 How., 232, and Brooks v. Martin, 2 Wall., 70. Here we insist that the record entitles the appellants to the relief demanded in the bill, entirely aside from any benefit claimed by them under the agreement with Culbertson.

We charge that the relation between appellants and Culbertson was known to the Buffalo Hump Co., but the Court finds that there is no evidence upon that point. An examination of the case of The Distilled Spirits, 11 Wall., 356, will show that the rule of the Federal Courts is that *knowledge acquired by an agent in a prior transaction is notice to and knowledge of his principal in a subsequent transaction.* Cul-

bertson was the agent of the Buffalo Hump Co., employed by Sweeny, its General Manager (See p. 274, Trans.), authorized to approach appellant Clark for the purchase of these claims. His agency imputes knowledge to his principal, the Buffalo Hump Co., of this agreement, if the agreement existed.

We feel that the great amount involved, together with the magnitude of the questions, justify us in urging the Court to allow us to appear to reargue the questions presented by the record. The record is so voluminous and contains so much matter, that it would be strange indeed if the Court, with the vast amount of labor imposed upon it, should completely grasp or thoroughly digest all of the facts. In the opinion, the Court, among other things, states: "and Patrick Clark, in the "course of his operations in the Poorman mine, ran several "drifts from the Poorman through the Ella and Missing Link "claims into the O'Neil claim, *one of which was on the* 1200 "*foot level of the Poorman mine.*" *The Court is clearly in* error here. At p. 242 of the transcript, Culbertson testified as follows, and it is not denied:

"Q. When was it Mr. Clark authorized you to run through "the 1100 or 1200 foot level into the Ella?

"A. He never authorized it.

"Q. He never authorized it? A. No.

"Q. I understood you to say that he gave you permission "or authority to do that, or directed you to do it?

"A. No, we took it. There was no authority. We run "that at the expense of the Tiger & Poorman Mining Co. *Mr.*

"*Clark had nothing to do with that.* We were out in that "country seeing what we could find."

The question of who ran that drift on the 1200 foot level of the Ella and Missing Link is, it seems to us, of controlling importance in this case, because it is the point at which the trespasses into our ground were committed and the unlawful knowledge of the value of our premises was obtained by the defendant.

And again, the agreement set out in paragraph six of the bill should be construed in connection with the testimony that is given concerning it at p. 478 of the transcript by Mr. Patrick Clark:

"Q. Now state what the consideration was, Mr. Clark?

"A. He accepted it for the purpose of taking care of our "interests there, acting as our agent, and if any ore was "found on that end of the Poorman adjoining the Ella, *that* "*he would work it economically for us and give us the net* "*proceeds* of our part of it, *if any ore was developed in the* "*working of the Poorman mine as depth was attained.*"

And Culbertson, at page 240 of the transcript, testified as follows:

"Q. Was that not part of your agreement with Mr. Clark?

"A. That I was to use my influence to secure such *equitable arrangement as would be fair to all the parties.*"

And again at page 173 of the transcript, on direct examination, Culbertson says:

"A. * * * Mr. Clark stated that he would see his part- "ners in regard to their each giving me a one-twentieth in-

"terest in the Ella and Missing Link grounds; which would "make me a fifth interest.

"Q. For what purpose?

"A. And as I was to be manager of the new company *I was "to use my influence towards securing as good terms as possi- "ble for the working of this ore through the Poorman shaft, "THE SAME AS IT HAD BEEN DONE BY HIMSELF "AND CO-OWNERS."*

We think the testimony is harmonious and consistent, and all should be construed together with the complaint.

The Court below held that we were not entitled to relief because we had done nothing *to investigate the condition of the property or protect ourselves against the fraud* (See top p. 166, Trans.). This Court, in effect, holds that we are not entitled to relief because in our efforts to protect ourselves, we went too far Brooks v. Martin, *supra*, and McBlair v. Gibbes, *supra*, following a uniform line of cases decided by the High Court of Chancery in England, hold that parties to an unlawful agreement still have a good standing in a Court of Equity if the Court is not called upon to enforce the unlawful agreement, and the Court in none of these cases, hesitated to give relief to one of the parties to such unlawful agreement, even where the right to the relief given grew out of such agreement.

The Court, in this case, concludes its opinion as follows: "A Court of Equity will not undertake to balance frauds," etc. This seems to be somewhat in conflict with the opinion of the Court in Hanley vs. Sweeny, 48 C. C. A., 619, where

the Court *found the complainant Hanley guilty of fraud,* and then states, "But all the fraud in the case was by no means "committed by the complainant," and then proceeds to give complete relief to the complainant Hanley according to the prayer of his bill. One of the two cases must be erroneous.

The Court has applied to the facts of this case a general rule of law that, in the abstract, must be conceded to be sound, but the application of it we think, is not warranted by the facts; and, *if the Court has misunderstood the facts,* the decision is in effect a denial of justice, a denial of our constitutional right to a trial and hearing by this Court, because, in the condition of this record, the Supreme Court of the United States might hesitate to issue its writ of certiorari to review the error. We can get no question before the Supreme Court except *that upon which this Court has decided the case.* We feel that we are entitled to have this Court state in its opinion, *by reference to the testimony,* what "Part of the information "at least so obtained by Culbertson was obtained in his legiti- "mate employment by the defendants, the Buffalo Hump Co. " * * * The withholding from complainants by Culbert- "son of such information constituted," etc.

We present to the Court here a question of great magnitude, one that has never been squarely decided, viz., whether the adjoining owner of a mineral claim has a right to prospect his neighbor's ground at depth through private workings of his own, inaccessible to any person except himself, and there discover great and valuable ore bodies, and purchase that claim without disclosing to the seller the fact of such discovery. The facts are admitted in the record. We feel that this ques-

tion is of such importance that, if this Court will pass upon it, no matter which way, the Supreme Court will issue its writ of certiorari on account of its importance to settle the question.

The fact that the question upon which this Court has decided the case was *not considered seriously by either side as a turning point in the case and has never been but briefly discussed in the argument*, it seems to us should be strong ground for the Court to grant us permission to reargue the case. We earnestly petition the Court for a rehearing.

In conclusion the appellants feel that it is to be regretted that the illness of Judge Gilbert, rendering it impossible for him to sit at the oral argument, and the previous judicial engagement of Judge Morrow, making an extension of time *for oral argument impracticable*, rendered it necessary to submit the case *briefly and imperfectly* to two of the judges instead of the full Court.

If, however, the Court is not disposed to grant us a rehearing, we earnestly petition a further discussion of the questions decided *showing the application of the facts to the rule of law upon which the case has turned*, so that the Supreme Court by its writ of certiorari may, if it sees fit, review the application of that rule to the facts, and if this Court declines to do this then we respectfully petition the Court to certify the questions presented by this record to the Supreme Court of the United States for its decision.

The Court omitted to pass upon the question of our going to New York to take the deposition of Sweeny. An order was entered at Boise by Judge Beatty, on the motion of Mr.

Heyburn (See p. 357, Trans.), authorizing him for the defendants to cross-examine Joseph MacDonald after the time so to do under the rules had elapsed, and as a condition therefor, the Court required defendants by the order to pay the costs and expenses of our going to New York to take Sweeny's deposition, because Sweeny's deposition was not taken and we were drawn there uselessly and needlessly. That order was never appealed from nor excepted to by the defendants. It is the law of the case, and yet Judge Beatty has refused to enforce it (See p. 166, opinion, Trans.). We called it up for review before this Court, and this Court has omitted to decide whether or not we are entitled to relief. We earnestly urge that this question be decided one way or the other by the Court.

Respectfully submitted.

WM. T. STOLL,

M. J. GORDON,

*Solicitors for Petitioners.*

Spokane, Washington, May 13, 1903

e hereby certify that the foregoing petition
or rehearing is, in our opinion, well founded
n point of law, and is not interposed for
elay.

W. T. Stoll